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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 800

LOCAL UNION NO. 10, UNITED ASSOCIATION OF JOURNEYMEN PLUMBERS and STEAMFITTERS OF THE UNITED STATES AND CANADA OF THE AMERICAN FEDERATION OF LABOR, et al.,

Petitioners

v.

O. J. GRAHAM, O. T. GRAHAM, and E. M. GRAHAM, Partners, Trading As Graham Brothers,

Respondents.

PETITIONER'S BRIEF IN REPLY TO RESPONDENTS BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

BEECHER E. STALLARD
Central National Bank Bldg.
Richmond, Va.
JOHN R. FOLEY,
736 Bowen Building
Washington, D. C.
Counsel for Petitioners

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 38(4)(a) of the rules of this Court, Petitioners submit this brief in reply to Respondents brief in opposition to the granting of a writ of certiorari.

The Respondents claim the Virginia Right to Work law was violated by Petitioners' peaceful picketing. Reliance is placed upon the Decree of the Law and Equity Court of

the City of Richmond awarding a permanent injunction and damages on July 17, 1951 (R. 26). The Supreme Court of Virginia, on January 23, 1951, refused to accept this case on appeal and affirmed the decree of the lower court (R. 35).

It is significant that at the time the foregoing courts made their decisions in this case, the status of peaceful picketing for communication purposes under the Virginia Right to Work law had not been determined in a considered opinion by the state's highest court. Thus, there was no yardstick available to guide any of the state courts in properly settling the important Constitutional issue raised by this case. However, on September 10, 1952, the Supreme Court of Virginia in *Local 1018, et al. v. Rountree, et al.*, rendered a decision virtually on all fours with instant case, the effect of which decision was to protect peaceful picketing for communication purposes. Since the court's opinion is unreported as yet, it will be set out below in its entirety:

SUPREME COURT OF APPEALS
STATE OF VIRGINIA

Painters and Paperhangers Local Union No. 1018, A. F. of L., an Association, and Others.

v. Record No. 3972

Rountree Corporation and Eanes Corporation

Present: Hudgins, C. J., Eggleston, Spratley, Buchanan, Miller, and Whittle, JJ.

Staunton, Virginia, September 10, 1952

Opinion by Justice Archibald C. Buchanan.

FROM THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND—THOMAS C. FLETCHER, JUDGE

Rountree Corporation and Eanes Building Corporation, complainants below, filed their bill for an injunction to restrain the union and its agents defendants below, from picketing the complainants' premises. The trial court refused to award the injunction, but upon presentation of the bill and defendants' answer to two justices of this court (Code 1950, §8-618) a temporary injunction was granted on the ground that the picketing was being carried on for an unlawful purpose. Afterwards depositions were taken and a decree was entered by the trial court holding that the picketing was unlawful and that the plaintiffs were entitled to such damages as they might show they had sustained on account thereof. Later a jury, empanelled to assess the damages, returned a verdict in favor of Rountree Corporation for $1,587.18 upon which judgment was entered and this appeal followed.

The defendants make eleven assignments of error but they present only these two issues: (1) whether the picketing, which was concededly peaceful, was for an unlawful purpose and therefore properly enjoined; (2) if so, whether the damages allowed were adequately proved.

There is little dispute about the facts. Eanes Corporation owned premises 111-115 West Broad street, in Richmond, in which Rountree Corporation, its lessee, conducted a retail furniture business. These premises were badly damaged by fire on November 12, 1948. Reconstruction and repairs were made and during their progress business operations were conducted in part and it was planned to reopen on a complete basis on May 10, 1949. When the picketing began on April 21, only painting and electrical work remained to be done.

The painting work had been let to O. A. Walker, who employed union labor and who began work the latter part of March, 1949. On April 8, Walker's

painters left the job and did not come back. The next day Eanes, president of the complainant companies, was informed that they were on strike. He then called Wilton B. Dickerson, inquired whether he operated a non-union shop, and on being advised that he did, Eanes engaged him to finish the painting. Dickerson began work on April 17 and there was no interference with his work after he took over the job.

In the meantime, the defendant Reynolds, business agent for the union, had written a letter to Eanes, dated March 31, 1949, stating:

> "We have been informed that your company is anticipating doing some painting and decorating. It would be greatly appreciated if you would consider using Union labor. My telephone number is 2-6837 and I will be glad to render any service possible."

On April 21, 1949, four days after Dickerson and his men began work, the union began picketing in front of the Rountree premises. This picketing consisted of one picket at a time, the defendant Rowe being one of them, walking back and forth on the sidewalk in front of the store, carrying a sign reading: "This painting is unfair to the Painters and Paperhangers Local Union No. 1018, A. F. of L., members of Richmond Trades and Labor Council."

This picketing continued until May 6, 1949, when it was enjoined as stated. Admittedly it was orderly and peaceful at all times and in all respects. It did not obstruct entrance into or exit from the store or the use of the street and no effort was made to impede customers. No attempt was made to have Dickerson sign a union contract, nor to induce the painters to become members of the union, nor to interfere with their continuing to work.

For about two days after the picket line was established no electricians appeared on the job. The electrical contractor informed Eanes that his men

were not permitted to cross the picket line. The contractor testified that after two days he got another crew of union men who crossed the picket line and resumed the work. He estimated the picket line caused a delay of ten days in the electrical work, including two days when he had two men, three days in acquainting the new men with the work already done and five additional days of work with a short crew.

There was testimony for the complainants to the effect that a delay of 30 days was experienced in completing the repairs and fully opening for business, of which ten days were chargeable to the defendants as a result of the picket line.

Prior to the picketing the complainants had never been engaged in any controversy with the union or its members; and likewise there was no controversy between the painting contractor or the electrical contractor and their employees, and no demand of any kind had been made on the complainants by the union. The only communication between the union and the complainants was the letter of March 31, above quoted.

Reynolds, the business agent of the union, testified that the purpose of the picketing was "To let the friends of organized labor and the sixteen thousand members that we have here in Richmond and vicinity know who is fair and unfair to us." On cross-examination he was asked what he wanted to accomplish by the picketing, and he said, "I wanted them sixteen thousand Union boys and ladies, and the sympathizers of organized labor in the City of Richmond and vicinity, to know that that painting was being done non-union."

In their answer to the bill, the defendants said they desired to unionize the non-union painting contractor and that the picketing had a twofold purpose—to let friends of the union know that a non-union contractor was doing the work and to let members

of the Richmond Building Trades Council and all organized labor of the vicinity know that fact.

In a written motion to dissolve the temporary injunction the defendants stated: "The purpose of the said peaceful picketing at all times has been to inform the public that non-union painters were being employed to do the painting on the complainants' premises to the end that plaintiff's employees or some of them may be unionized, that is, they or some of them become members of defendant union."

The defendants argue that the picketing was for the sole purpose of communication, and no more than an exercise of their right to freedom of speech, guaranteed by the First and Fourteenth Amendments of the Federal Constitution and by the twelfth section of the Virginia Bill of Rights.

The complainants contend that communication was not the sole purpose of the picketing but that the true purpose was to compel complainants to get rid of the non-union painters, employees of Dickerson, an independent contractor, or to compel those employees to join the union as a condition of continued employment. Such purpose it is argued was unlawful and hence the picketing was properly enjoined under the doctrine of *Gibony v. Empire Storage and Ice Company*, 336 U.S. 490, 69 S. Ct. 684; 93 L. ed. 834, and similar cases.

In *Edwards v. Commonwealth*, 191 Va. 272, 60 S. E. 2d 916, we reviewed the picketing cases decided by the United States Supreme Court beginning with *Thornhill v. Alabama*, 310 U.S. 88, 60 S. Ct. 736, 84 L. ed. 1093, and including the *Gibony* case, as well as the three cases decided in May, 1950. We concluded from that review that the holding in the *Thornhill* case had not been departed from to the effect that a statute (or an injunction) which prohibits picketing for a lawful purpose, unaccompanied by the threat or the fact of force, and limited to truthful publication of the facts of a dispute, is invalid; that regulation of picketing by the State,

through legislation or court action, must have a reasonable basis in preventing disorder, restraining coercion, protecting life or property, or promoting the general welfare.

We held in the *Edward* case that the part of section 3 of the picketing statute, Acts 1946, ch. 229, p. 391, Code 1950, §40-64, which made it unlawful for a person not a *bona fide* employee of the business or industry being picketed to participate in any picketing with respect to such business or industry was invalid.

McWhorter v. Commonwealth, 191 Va. 857, 63 S. E. 2d 20, involved a prosecution under section 1 of the same act for interference with the right to work by the use of insulting language. The defendant there contended that the statute constituted an abridgment of the right of freedom of speech and was designed to end the practice of picketing. In upholding the validity of that section, we said:

"We see nothing in the section of the statute here under review which supports the assertion of the defendant that it was 'designed to end the practice, common to labor disputes, known as picketing'. It does not prohibit 'peaceful picketing or peaceful persuasion' in connection with labor disputes which are protected under the constitutional guaranty of freedom of freedom of speech. *American Federation of Labor v. Swing*, 312 U.S. 321, 61 S. Ct. 568, 85 L. ed. 855." 191 Va. at p. 865, 63 S. E. 2d at p. 24.

In *Cafeteria Employees Union v. Angelos*, 320 U.S. 293, 64 S. Ct. 126, 88 L. ed. 58, cited in both the *Edwards* and *McWhorter* cases, the court reversed an order enjoining the union from picketing at or near Angelos' place of business as being illegal restraint upon "the right of workers to state their case and to appeal for public support in an orderly and peaceful manner regardless of the area of immunity as defined by state policy." That case also held that the use of the words "unfair to organized and political controversies" and "is not to falsify

facts." See also on this point *Blossom Dairy Co., v. International Brotherhood, Etc.*, (W. Va.), 23 S.E. 2d 645.

In *American Federation of Labor v. Swing*, 312 U.S. 321, 61 S. Ct. 568, 85 L. ed. 855, also cited in the *Edwards* and *McWhorter* cases, an injunction had been granted against picketing on the ground that "peaceful persuasion" was forbidden because those who were enjoined were not in Swing's employ. It was held that such a ban of free communication was inconsistent with the guarantee of freedom of speech; that "The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ." 312 U.S. at p. 326, 61 S. Ct. at p. 570.

In *Bakery and Pastry Drivers, Etc., v. Wohl*, 315 U.S. 769, 62 S. Ct. 816, 86 L. ed. 1178, it was said that "one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive." 315 U.S. at p. 774, 62 S. Ct. at p. 818.

The principles announced in the cases cited are, we think, controlling in the case in judgment.

Clearly the picketing was conducted in a manner that offended no established rule and was legal unless it was for an unlawful purpose.

The purpose of the picketing avowed in the answer and in the motion to dissolve was to unionize the non-union painting contractor and his employees. The evidence does not disclose a different purpose. The charge that there was a purpose to compel the complainants to discharge the non-union painters or to compel the painters to join the union as a condition of their continued employment is not established by the evidence. No such demand or even suggestion was made by the defendants to the complainants, to the contractor or to his men. If the

peaceful publication of the facts in an effort to unionize the painters resulted in economic pressure on the complainants, as employers of the painters, that result did not make the purpose unlawful or the picketing illegal. It cannot be said that picketing otherwise legal becomes illegal because of the possibility that as a result of it a person affected by it may do an unlawful act, unless the purpose of the picketing is to compel the doing of such an act.

This that was said in *Senn v. Tile Layers Protective Union, &c.*, 301 U.S. 468, 57 S. Ct. 857, 81 L. ed. 1229, is applicable here: "The sole purpose of the picketing was to acquaint the public with the facts and, by gaining its support to induce Senn to unionize his shop. There was no effort to induce Senn to do an unlawful thing. There was no violence, no force was applied, no molestation or interference, no coercion. There was only the persuasion incident to publicity. * * *"

Building Service &c. Union v. Gazzam, 339 U.S. 532, 70 S. Ct. 784, was cited in the *Edwards* case an upholding an injunction against peaceful picketing because it was for the unlawful objective of having the employer coerce his employees' selection of a bargaining representative. It was there said that picketing is in part an exercise of the right of free speech, "But since picketing is more than speech and establishes a *locus in quo* that has far more potential for inducing action or non-action than the message the pickets convey, this Court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity."

The court distinguished the *Swing* case, pointing out that peaceful picketing for any lawful purpose was not prohibited by the decree under review, and that "Respondent does not contend that picketing *per se* has been enjoined but only that picketing which has as its purpose violation of the policy of the State. There is no contention that picketing di-

> rected at employees for organization purposes would be violative of that policy. * * * The injunction granted was tailored to prevent a specific violation of an important state law."
>
> The record here fails to disclose any violation of picketing statute dealt with in the *Edwards* and *McWhorter* cases; or any violation of the Right to Work statute (ch. 2, Acts 1947, extra session, p. 12; Code 1950, §40-68 ff.) held valid in *Finney v. Hawkins*, 189 Va. 878, 54 S.E. 2d 872; or violation of any other statute; nor do we think it violated a State policy. It is not the public policy of this State to prohibit all picketing. Only certain types are prohibited by the picketing statute referred to. By the 1952 amendment of that statute, Acts 1952, ch. 674, p. 1123, courts of equity were authorized to enjoin interference with lawful picketing when necessary to prevent disorder, etc.
>
> We hold that the picketing in question was lawful, and, that being true, it was not a basis for the assessment of damages against the defendants. "One has no constitutional right to a 'remedy' against the lawful conduct of another." *Senn v. Tile Layers Protective Union, &c., supra.*
>
> The decree appealed from is therefore reversed and final decree for the defendants will be entered
>
> *Reversed and final decree.*

In refusing to accept the instant case on appeal and render the same decision made in the foregoing case, the Supreme Court of Virginia committeed palpable error. The arbitrariness of the court's action is plainly manifest.

For there is no basis in fact or in law why the picketing in the *Rountree* case was lawful and the picketing in the instant case is unlawful and thus enjoinable. There was no violation of state policy by the picketing in the *Rountree* case. The court stated clearly: "It is not the public policy of this State to prohibit all picketing."

The picket sign in the *Rountree* case read: "This paint-

ing is unfair to the Painters and Paperhangers Local Union No. 1018, A. F. of L., member of Richmond Trades and Labor Council."

The picket sign in the instant case read: "This is not a union job. Richmond Trades Council."

As in the *Rountree* case, the picketing here was carried on by one person only at the job site. And as to the crucial question in both cases—whether an unlawful demand of any kind was made on the company involved by the union involved—the record in the instant case discloses there was no such demand by Petitioners on Respondents. There was discussion by Petitioners with Respondents relative to employment of union sub-contractors in the future when Joinville visited Graham on July 28, 1950. But the only basic difference in the communication in both cases is that in the instant case it was made by Joinville's personal visit while in the *Rountree* case it was made by letter. Surely, the difference in the method of communication provides no substantial basis justifying the enjoining of the picketing here and the protection of the picketing in the *Rountree* case.

A brief recital of the testimony in the instant case discloses that there was no demand made on or threat given by Petitioners to Respondents.

Respondent alleges that on July 28, 1950, Petitioner Joinville and one Cochrane "told Graham that they wanted him to work all union labor on the job or suffer the consequences: . . . and that Graham would have to take the non-union plumbing subcontractor off the job and cancel his contract." (Respondent's brief pp. 3-4.). The Record conclusively and clearly contains an explanation of the purpose of Joinville's visit and the conversation that took place with Graham. The testimony of Joinville on pages 465 to 468 of the Record is as follows:

Q. Mr. Graham alleges that you called upon him on July 28th,

and I quote: "and renewed his request that all non-union labor on the project be laid off or discharged."

Mr. Graham further alleged, and I quote: "and stated that if that weren't done every effort would be made to prevent any union labor employed by the general contractor or any sub-contractor on that project from continuing work thereon."

Did you make any demand of Mr. Graham that he lay off all non-union labor on the project?

A. I did not.

Q. Did you tell him that you were going to put a picket around the job or prevent the union labor employed by the general contractor or any sub-contractor on the project continuing to work thereon?

A. I did not. I told Mr. Graham this, in these almost exact words, "that I thought that my local union, plumbers and steam fitters, would question Mr. Graham using union sub-contractors on some jobs to make a profit and then falling back on the State Law on other jobs to use non-union plumbing contractors, that I was positive and knew that my local [fol. 447] union would call that to my attention and would be reluctant to lend their name and their membership to making money for Mr. Graham when he was so insistent in not violating the State Law when he only used union and non-union sub-contractors to get contracts and didn't care whether he violated the law or not as long as he got a price, and price alone!"

Q. Mr. Graham then told you that he would employ one hundred per cent union contractors if the sub-contractors were low bidders?

Mr. Moore: I object to counsel leading the witness.

A. Mr. Graham had always as a general contractor in the past on his other work estimated and got jobs on price and he took, as other contractors will do, many of them in this city—took a low bid. That is the way they receive contracts. It is no question about that. That is normal business and that is what happens. No contractor would ever deny that, that he gets it on cost. If he doesn't, his competitor gets it, except for a cost plus when it is handed out to him on a platter.

Q. If Mr. Graham then employed one hundred per cent non-union on cost, there would be no occasion for him to employ any union men, would it?

A. That is right—he would get a non-union sub-contractor and

he would hire where there was no wage standards on [fol. 448] hours or wages and he would employ anyone he wanted and pay them whatever he wanted to.

Q. If he employed one hundred per cent union, then there would be no occasion for him to employ non-union?

A. That is right.

Q. You have testified that you went to see him for the purpose of getting him to use some of your union sub-contractors, is that correct?

A. That is my job, to promote sub-contractors and my membership wherever possible.

Q. He refused to do just that, didn't he?

A. He said he had already let the contract to a non-union—as I assume, I had no relationship with him—to a contractor by the name of Talley and he had no intention of violating that contract with Talley, and I agreed with him.

Q. Then he denied your men the right to work for him, didn't he?

A. He definitely did.

Mr. Moore: I object to that question as it is leading. Counsel is continually leading this witness, to which I have objected before and do again. Also the question calls for a conclusion of law on the part of the witness which he is not qualified to state.

[fol. 449] By Mr. Stallard:

Q. Mr. Joinville, did Mr. Graham refuse to employ any of your local union men?

A. He definitely took the stand he wouldn't have anyone but Talley on that job.

Q. Did you ask Mr. Graham to cancel his contract with Talley?

A. No. I have been in this construction business long enough and business agent for twenty some years and I know when a contract is signed and delivered nobody cancels them.

Q. That would have nothing to do with the State Law, would it?

A. That is right.

Mr. Moore: I object again to this question on the ground the witness is not qualified as an expert and he is being asked to state conclusions of law.

By Mr. Stallard:

Q. In any event, if he changed his position and cancelled his contract, he would breach his contract, wouldn't he?

Mr. Moore: I object on the same ground.

A. He would have the right I assume under various phases of his contract to cancel it at any time and place it with another contractor. I presume as a business man he [fol. 450] preserved that right.

Q. But if he didn't have that reservation, it would be a breached contract, wouldn't it?

A. It would definitely.

Q. Mr. Graham testified that you stated, and I quote: "that whatever consequences that resulted from that." What did you have reference to there if you used that language?

A. If I used that language—of course, I don't remember definitely—I had reference to that if Mr. Graham continued to go along as he told me he was going, using a contractor where he had a better price to make a bid, that my members I assumed would question me about whether they should lend themselves to helping Mr. Graham, that maybe we would keep them strictly within his interpretation of the law, that he would be violating the great State of Virginia Law to employ the union sub-contractor and have union men on his job. That is what he implied, that it would be a violation of the law.

Q. Did you state to him at any time you would put a picket on the job?

A. I never threatened him with a picket.

Cross-examination by Respondent's counsel did not elicit any statements qualifying, altering or contradicting the aforestated testimony. There was no request that Graham cancel his contract with Talley. In fact Joinville agreed that Graham should not violate the contract (R. 467). The purpose of Joinville's visit was not to make demands or threats. Rather, it was to discuss Graham's policy for hiring of union sub-contractors in the future. Proof of this is seen in Respondent counsel's cross-examination of Joinville which educed the following:

(R. 473.)

"By Mr. Moore:

Q. Mr. Joinville, you say that you told Mr. Graham your union

objected to him using union sub-contractors on some jobs and non-union sub-contractors on other jobs?

A. Yes.

Q. Why do you object to that?

A. Because he used my organization to get contracts. He definitely used us if he wanted to estimate on a union job, Thalhimer's or any customer that wanted or would like the union men. He would have to cater to our union labor on there so there wouldn't be any labor disputes or cause the owner any trouble. He would definitely have to use us and we object to him using us when it suits his convenience and then throwing us out when it doesn't. This naturally has hurt us, (R. 474)

Q. Your objection was that he didn't use you all the time?

A. After all, if he used us to further his own interests [fol. 460] on half a dozen jobs, he certainly owed us a little something for the privilege of using us; he certainly owed us the courtesy of giving us the opportunity of doing his work on other jobs. If I had a non-union employer and I made him money for a year, I would feel very much surprised and maybe very bitter against him if he laid me off when he could hire somebody five cents cheaper the next day.

. . . . . .

Q. So the effect of what you were asking Mr. Graham to do was to so employ sub-contractors on all of his work that only union labor work on them. (R. 475)

A. I didn't ask Mr. Graham anything about that. What I asked Mr. Graham I presented him—we have a directory and I presented Mr. Graham a directory and a list of contractors whom we would like to have him give an opportunity to bid on his work.

. . . . . .

Q. At the time you talked to Mr. Graham at the time you handed him a list or directory you asked him that he use only those contractors. Now the result of his using only those contractors under the conditions they were working at that time would be he would use all union labor and no non-union labor, isn't that right? [fol. 463]

A. Yes, sir, if he had used any one of those contractors he would have gotten a union contractor.

Q. And if he used only those contractors, he would never use a non-union plumber?

A. He asked for that list many a time. When he goes after a union job he doesn't take any other list. He asked for that list—I think we could show we have had requests from Mr. Graham when he was given a union job he was given the list of union sub-contractors. (R. 476)

Thus, there is no substantial factual basis in the Record supporting Respondents' statement in their brief:

> "that they [Petitioners] demanded of respondents that this [making jobs union] be accomplished by cancelling the contract with the non-union sub-contractor, threatening them with the consequences if they failed to acquiesce in that demand; and that the actual picketing was conducted for the purpose of stopping work on the project so that respondents would be faced with the alternative of using all union labor on the project, or closing down the job." (Respondents' Brief, p. 6.)

The Respondents have sought to depict a demand instead of a mere request for statement of future business policy, and thus support the injunction ordered in this case. However, on this ground or any other, the Record, as particularly set forth above, presents no real basis whereby the Virginia Supreme Court may protect peaceful picketing in the *Rountree* case and refuse the same constitutional protection in the instant case.

No lengthy consideration is warranted of the cases involving the National Labor Relations Act referred to on pp. 9 to 11 of Respondents' brief. In *I.B.E.W. v. N.L.R.B.*, 341 U.S. 694, 697, the business agent, Patterson, picketed the job site and then telephoned the general contractor, Giorgi, and informed the latter that he, Giorgi, would have to replace the non-union sub-contractor, Langer, in order to complete the job, and Patterson further stated "that if Giorgi did not replace Langer, he would not receive any skilled trades to finish the rest of the work." In the in-

stant case there was no communication by the union representatives with Respondents after the picketing commenced —nor had there been any communication between the parties for two months prior to the picketing.

In *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675, there had been a long standing dispute between the Council and the non-union sub-contractor. The Record in the instant case does not disclose that there was a dispute at anytime between the Council and Talley, the non-union plumbing sub-contractor. The absence of such a dispute fortifies the Petitioner's evidence that the peaceful picketing was for communication purposes only and did not have as an object the termination of Graham's contract with Talley.

The constitutional protection of peaceful picketing for communication purposes was not an issue in *Local 74, et al. v. N.L.R.B.*, 341 U.S. 707, 95 L. Ed. 1309.

On the basis of the facts and the authorities cited, it is respectfully submitted that the peaceful picketing for communication purposes in the instant case deserved the same constitutional protection by the Supreme Court of Virginia as that Court afforded the picketers in the *Rountree* case. The Court acted arbitrarily in denying that protection. An important federal question was raised warranting the issuance of a writ of certiorari.

Respectfully submitted,

BEECHER E. STALLARD
Central National Bank Bldg.
Richmond, Va.
JOHN R. FOLEY,
736 Bowen Building
Washington, D. C.
Counsel for Petitioners